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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner Tyson Foods, Inc., became a successor to petitioner Holly Farms Corporation on the date upon which Tyson bought all of the stock of Holly Farms.

2. Whether the Board reasonably concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5), by refusing to bargain with the union about the terms and conditions of employment of Holly Farms' drivers, as an effect of petitioners' decision to integrate Holly Farms' transportation operation into Tyson's transportation system.

3. Whether the Board properly ordered petitioners to reinstate with backpay 47 Holly Farms drivers who were unlawfully discharged for declining employment under terms and conditions unilaterally imposed by petitioners.

4. Whether the Board reasonably found that petitioners' "live haul" employees were not "agricultural laborer[s]," which are excluded from the Act's coverage under Section 2(3) of the Act, 29 U.S.C. 152(3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	12
Conclusion	26
Appendix	1a

TABLE OF AUTHORITIES

Cases:

ABF Freight System, Inc. v. *NLRB*, 114 S. Ct. 835 (1994)	21
Bayside Enterprises, Inc. v. *NLRB*, 429 U.S. 298 (1977)	11, 21, 22, 23, 24, 25
Coleman v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980)	24
Drug Package Co., 228 N.L.R.B. 108 (1977), modified, 570 F.2d 1340 (8th Cir. 1978)	20
EPE, Inc. v. *NLRB*, 845 F.2d 483 (4th Cir. 1988)	13
Esmark, Inc. v. *NLRB*, 887 F.2d 739 (7th Cir. 1989)	13, 16
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	6, 13
Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 (1949)	24
First National Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1981)	8, 18
Hendricks-Miller Typographic Co., 240 N.L.R.B. 1082 (1979)	13
Imco Poultry, 202 N.L.R.B. 259 (1973)	25-26
Miami Foundry Corp. v. *NLRB*, 682 F.2d 587 (6th Cir. 1982)	16
NLRB v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972)	6, 12-13, 17

Cases—Continued: Page

NLRB v. *Dent*, 534 F.2d 844 (9th Cir. 1976) 17
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) .. 7
NLRB v. *Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971) 15, 16
NLRB v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) 25
NLRB v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) 25
S & F Enterprises, Inc., 312 N.L.R.B. 770 (1993) 20
Spencer Foods, Inc., 268 N.L.R.B. 1483 (1984), aff'd *sub nom. United Food & Commercial Workers, Local 152* v. *NLRB*, 768 F.2d 1463 (D.C. Cir. 1985) 13
Tuskegee Area Transportation System, 308 N.L.R.B. 251 (1992), enforced mem., 5 F.3d 1499 (11th Cir. 1993), cert. denied, 114 S. Ct. 1834 (1994) 20
United Food & Commercial Workers, Local 152 v. *NLRB*, 768 F.2d 1463 (D.C. Cir. 1985) 15
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 18

Statutes:

Fair Labor Standards Act § 3(f), 29 U.S.C. 203(f) 21, 22, 23
National Labor Relations Act, 29 U.S.C. 151 *et seq.* ... 12
§ 2(3), 29 U.S.C. 152(3) 21
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2-3
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2-3
§ 8(a)(5), 29 U.S.C. 158(a)(5) 5, 6, 8, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A78) is reported at 48 F.3d 1360. The decision and order of the National Labor Relations Board (Pet. App. A79-A205) and the decision of the administrative law judge (Pet. App. A206-A935) are reported at 311 N.L.R.B. 273. The Board's decision in the representation proceeding (App., *infra*, 1a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1995. A petition for rehearing was denied on May 9, 1995. Pet. App. A936-A938. The petition for a writ of certiorari was filed on August 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In October 1988, petitioner Holly Farms Corp. (Holly Farms) was engaged in the production, processing, and transportation of poultry. Pet. App. A5. At that time, petitioner Tyson Foods, Inc. (Tyson), a firm engaged in similar operations, offered to buy the stock of Holly Farms. *Id.* at A4-A5. In anticipation that its offer would be accepted, Tyson officials drafted a plan, dated January 24, 1989, to merge the two companies' transportation divisions. *Id.* at A600.

In December 1988, an organizing campaign was begun by respondent Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 592, 567, and 988, all affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), among a unit of drivers and yardmen at Holly Farms' plants in North Carolina, Virginia, and Texas. Pet. App. A6, A81 n.8, A210-A211, A232.[1] In March 1989, the Union

[1] The Union also began organizing campaigns among units of production employees and "live haul" employees at Holly Farms. "Live haul" employees were responsible for catching, caging, and transporting petitioners' chickens from the farms of independent contract growers to petitioners' processing plant in Wilkesboro, North Carolina. See Pet. App. A40-A41, A787-A788 n.268; see also n.4, *infra*. The National Labor Relations Board found that, in connection with those campaigns, petitioners committed numerous violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by, *inter alia*, discharging employees for engaging in union activity. Pet. App. A157-A163. The court of appeals upheld those findings (*id.* at A8), and petitioners do not challenge them here.

was elected and certified as the collective-bargaining representative for the drivers-yardmen unit. *Id.* at A11, A233. In April 1989, the Union and Holly Farms began negotiating a labor agreement for that unit. *Id.* at A11, A597. The negotiations were suspended in July 1989, however, when Holly Farms decided to accept Tyson's bid. *Id.* at A598 & n.195.

On July 18, 1989, Tyson acquired 100% of the stock of Holly Farms, making it a wholly owned subsidiary of Tyson. Pet. App. A11, A61, A715. In a meeting with the Union in August 1989, Tyson announced that it had taken "full control" of Holly Farms' operations and that it planned to integrate Holly Farms' western transportation division into Tyson's transportation department. *Id.* at A95-A96, A602-A603, A607 n.199. In September 1989, however, Tyson decided instead to integrate Holly Farms' entire transportation system, both its western and eastern divisions, into Tyson's transportation system. *Id.* at A617; see also *id.* at A96, A97 n.16, A615-A616, A773, A775-A776.

Tyson announced its full-integration decision in a meeting with the Union on September 12, 1989. Pet. App. A620. At that meeting, Tyson also expressed its view that, after integration, Holly Farms' transportation divisions would cease to exist, and that the Union would not have majority support among the combined group of transportation employees. *Id.* at A98, A626. Immediately after the meeting, Tyson wrote all 209 of Holly Farms' drivers, offering to hire

them, on different terms, as employees of Tyson. Forty-seven drivers failed to accept the offer by September 22, 1989, and were thereby deemed to have quit. *Id.* at A12-A13, A739.

Petitioners refused the Union's later written requests to bargain over (1) a labor agreement for the Holly Farms drivers-yardmen unit; (2) the decision to integrate the Holly Farms transportation system into that of Tyson; and (3) the effects of that decision upon the Holly Farms drivers and yardmen. On September 22, 1989, petitioners withdrew recognition from the Union. Pet. App. A100-A101, A637, A638-A639, A640-A642, A643-A646, A651-A653. On October 1, 1989, the Union called a strike against petitioners on behalf of the Holly Farms drivers and yardmen. *Id.* at A241, A779-A780.

b. In late December 1988, Union Local 391 launched an organizing campaign in a unit consisting of Holly Farms' "live haul" employees. Pet. App. A211 n.49, A233. In a representation proceeding, the Board found that two groups of "live haul" employees together constituted an appropriate bargaining unit: (1) truck drivers, forklift operators, and "chicken catchers" at petitioners' plant in Wilkesboro, North Carolina; and (2) feed haul, feed mill, and service center employees at petitioners' plant in Roaring River, North Carolina. *Id.* at A211-A212, A233-A235. The Board rejected Holly Farms' contention that the live haul employees were "agricultural laborer[s]," which are excluded from the Act's coverage. App., *infra*, 1a-6a; see also 29 U.S.C. 152(3) ("The term 'employee' * * * shall not include any individual employed as an agricultural laborer."). On July 27, 1989, the Board held an election among the live haul

unit, resulting in a tie vote with one challenged ballot. Pet. App. A235.

2. The Union filed unfair labor practice charges against Tyson and Holly Farms. The Board's General Counsel issued consolidated complaints alleging that Tyson became Holly Farms' successor on July 18, 1989, when it acquired the stock of Holly Farms, and that Tyson thereafter violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by refusing to bargain with, and withdrawing recognition from, the Union. Pet. App. A208 n.48, A209-A210.

a. After a hearing, the administrative law judge (ALJ) determined that, as of July 18, 1989, Tyson became the legal successor to Holly Farms and, as such, became obligated to bargain with the Union concerning a labor agreement for the drivers-yardmen unit. Pet. App. A716, A875. The ALJ found the requisite continuity of operations to hold that Tyson was a successor employer because, for about two months after the July 1989 acquisition, there were no significant changes in operations "from the standpoint of [the drivers-yardmen] unit employees" that would have "affect[ed] their desire for continued representation by the Unions." *Id.* at A716; see also *id.* at A713-A715. On the other hand, the ALJ rejected petitioners' contention that only a stock transfer, without any significant internal changes, took place during that period. The ALJ found, instead, that, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization" and were required to act "in accordance with Tyson's dictates," including "what to tell the Unions" about the "major [proposed]

changes affecting the drivers-yardmen unit." *Id.* at A717-A718.

The ALJ observed that, although Tyson was obligated to bargain with the Union as of July 18, 1989, Tyson was "free to set initial terms" for the drivers-yardmen unit. Pet. App. A719 (quoting *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987), quoting *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 294 (1972)). Because Tyson failed to change the existing terms and conditions of employment of that unit for two months, however, those terms "became * * * not subject to unilateral changes." Pet. App. A721. The ALJ rejected petitioners' contention that the unit ceased to exist when Tyson's full-integration decision took effect on September 22, 1989. The ALJ found that Holly Farms' transportation divisions retained separate identities after the integration. *Id.* at A735.

Accordingly, the ALJ concluded that petitioners violated Section 8(a)(5) of the Act by, *inter alia*, unilaterally announcing the full-integration decision to the Union and dealing directly with the drivers-yardmen unit employees on September 12, 1989 (Pet. App. A748, A885); unilaterally changing the terms and conditions of employment of unit employees on September 22, 1989 (*id.* at A756-A757); and withdrawing recognition from the Union (*id.* at A756). In addition, the ALJ found that the 47 Holly Farms drivers who declined employment under Tyson's unilaterally imposed terms had been constructively discharged, and that the work stoppage called by the Union on October 1, 1989, was an unfair labor practice strike. *Id.* at A888-A889.

As a remedy, the ALJ ordered petitioners to recognize and bargain with the Union concerning the drivers-yardmen unit; to rescind the unilateral changes to the unit employees' terms and conditions of employment, retroactive to September 22, 1989; to make the unit employees whole for any losses sustained as a result of the unlawful unilateral changes; to reinstate and make whole the 47 constructively discharged drivers; and, upon receipt of an unconditional offer to return to work, to reinstate to his or her former position any employee who participated in the October 1, 1989, strike. Pet. App. A914-A915, A918-A919, A921.

b. The ALJ sustained the challenge to the determinative ballot cast in the July 27, 1989, election in the live haul unit; that election thus ended in a tie. Pet. App. A818-A819, A856-A857. Finding that petitioners' unfair labor practices precluded the holding of a fair rerun election, the ALJ ordered petitioners to recognize and bargain with the Union as the representative of the live haul employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A794, A817, A919. Relying on the Board's determination in the representation proceeding, the ALJ rejected petitioners' contention that the live haul employees were "agricultural laborer[s]" excluded from the Act's coverage. *Id.* at A786-A787; see p. 4, *supra*.

3. In all relevant respects, the Board affirmed the ALJ's decision and adopted his remedial order. Pet. App. A79-A205. The Board found that "Tyson became a successor of Holly Farms when it purchased a controlling interest in the corporation on July 18, [1989]." Pet. App. A110-A111. The Board observed

that "Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer." *Id.* at A111. The Board also found that Tyson lost its right to set the initial terms on which it would hire Holly Farms' drivers when it failed to change the existing terms of their employment for two months after it became a successor; Tyson therefore "could not unilaterally change those terms on September 12, [1989]," when it offered to hire the drivers on different terms. *Id.* at A114.

The Board further found that petitioners violated Section 8(a)(5) of the Act by refusing to bargain with the Union "about the September 12 offer of employment to the Holly Farms unit employees as an effect of the integration decision." Pet. App. A124-A125.[2] The Board explained that "employers may be obligated to bargain over the effects on unit employees of management decisions that are not themselves subject to the obligation to bargain." *Id.* at A121. That principle applied here, the Board found, because "the terms at which the Holly Farms drivers were offered employment were not an inevitable consequence of the functional integration of the transportation departments, but were only one of a number of

[2] The Board reversed the ALJ's finding that petitioners violated Section 8(a)(5) by refusing to bargain with the Union about the integration decision itself. Pet. App. A120-A121. Relying on *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), the Board concluded that the decision to integrate was not a mandatory subject of bargaining. Pet. App. A116-A121. That ruling is not at issue in this Court.

responses to changed circumstances." *Id.* at A122 (internal quotation marks omitted).[3]

The Board concluded that a *Gissel* bargaining order covering the live haul unit was appropriate. Pet. App. A156. In rejecting petitioners' challenge to the *Gissel* order, the Board relied on its prior determination in the representation proceeding that the live haul workers were not "agricultural laborer[s]" within the meaning of the Act. *Id.* at A83 n.8.

4. The court of appeals enforced the Board's order. Pet. App. A1-A53.

The court held, first, that "substantial evidence and the policies of the labor laws support the Board's finding here that Tyson came under a duty to bargain with the Union when it purchased Holly Farms." Pet. App. A21. The court explained that "[t]he policy underlying the National Labor Relations Act is to promote industrial peace," and that "[t]he successorship doctrine * * * seeks to promote this policy by forestalling the employee frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union." *Id.* at A21-A22 (citations and internal quotation marks omitted). The court observed that, for two months after purchasing Holly Farms, Tyson made no changes in operations

[3] The Board further found that petitioners unlawfully discharged the 47 drivers who declined Tyson's September 12, 1989, job offers. Pet. App. A125. The Board rejected petitioners' contention that they were free to withdraw recognition from the Union because the Holly Farms drivers-yardmen unit ceased to exist after integration. *Id.* at A127-A131. The Board accordingly concluded that the strike called on October 1, 1989, was an unfair labor practice strike. *Id.* at A167.

that would have caused Holly Farms' employees to believe that their job situations had essentially altered (*id.* at A25); those employees therefore "could reasonably be expected to continue their support for the Union" (*id.* at A26).

The court held, next, that substantial evidence supported the Board's finding that Tyson violated Section 8(a)(5) of the Act by unilaterally changing the terms and conditions of employment of the members of the drivers-yardmen unit in September 1989. Pet. App. A28. The court observed that, even if an employer need not bargain over an "'economically-motivated' management decision[]," it must bargain over "effects" that "are not the inevitable consequence of the underlying management decision itself." *Id.* at A32-A34 (internal quotation marks and emphasis omitted). The court found that "it was not inevitable for the Company to impose Tyson's pay plan and working conditions upon Holly Farms' drivers" (*id.* at A34); instead, "there was room for bargaining," as shown by, *inter alia*, Tyson's efforts "to accommodate the drivers' individual preferences as to the duration and mileage of their hauls" (*id.* at A35).

Finally, the court upheld the Board's determination that the employees in the live haul unit were not "agricultural laborer[s]" excluded from the Act's protection under Section 2(3) of the Act. Pet. App. A52. On appeal, petitioners challenged the Board's determination only with respect to the truck drivers, forklift operators, and chicken catchers at the

Wilkesboro plant. *Id.* at A39.[4] Relying on *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977), the court explained that, under the Act, "agriculture is defined in both a primary and a secondary sense": "[t]he primary meaning encompasses farming in all its branches, including the raising of poultry," while "the secondary meaning includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental[] to or in conjunction with primary farming operations." Pet. App. A44-A45 (internal quotation marks omitted). The court observed that petitioners conceded that the Wilkesboro workers were not engaged in "primary" farming activities. *Id.* at A46. The court upheld the Board's determination that they also were not engaged in "secondary" farming activities. *Id.* at A52. The court reasoned that the live haul workers' activities occurred after "the Company has turned the broiler chicks over to independent contract growers and the Company's status as a farmer engaged in raising poultry (a primary agricultural activity) has ended." *Id.* at A48. The court held that those activities thus were not incidental to any

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[4] The court described the duties of those employees as follows (Pet. App. A40-A41 (footnote omitted)):

> A crew consists of a live-haul truck driver, a forklift operator, and about nine "chicken catchers." The live-haul driver drives a flat-bed truck, which carries the entire crew to the farms of the independent contract growers who raise the broiler chickens. Under cover of darkness, the chicken catchers manually catch and cage the chickens, the forklift operator places the steel cages on the flat-bed truck, and the truck delivers the chickens to a storage area * * *.

primary farming operations on the part of petitioners. *Id.* at A48-A49.[5]

Judge Niemeyer dissented from the holdings that Tyson became a successor employee upon the acquisition of Holly Farms' stock and that the live haul employer at the Wilkesboro plant were not exempt from the Act as "agricultural laborer[s]." Pet. App. A54-A55.[6]

ARGUMENT

1. The first issue in this case is whether, as of July 18, 1989, the relationship between Tyson and Holly Farms was that of a "successor employer" to a "predecessor employer," or, rather, that of a "new stockowner" to a "continuing employer." The Board found that, on the facts of this case, the relationship between Tyson and Holly Farms was a successorship. Pet. App. A110-A114. The court of appeals correctly held that the Board's finding was supported by substantial evidence. *Id.* at A13-A27.

a. Under the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, a new employer is a "successor" to a predecessor employer if there is "substantial continuity" between the business enterprise and workforce of the two employers. *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280-

[5] The court of appeals rejected petitioners' other arguments concerning the entry of a *Gissel* order covering the live haul unit. See Pet. App. A37 n.2, A52. Petitioners do not renew those arguments in this Court. Instead, they challenge only the determination that the live haul employees covered by the *Gissel* order are statutory employees. See Pet. 57.

[6] Judge Niemeyer did not, however, dissent from the subsequent denial of petitioners' petition for rehearing and suggestion of rehearing en banc. Pet. App. A936-A938.

281 & n.4 (1972); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 43 (1987) (*Burns* "approved" the "substantial continuity" approach of the Board). A "successor" employer is not bound by the substantive terms of the predecessor's collective bargaining agreement, but it is obligated to bargain with the union representing the predecessor's workforce. *Burns*, 406 U.S. at 281-282. By contrast, a stock transfer "involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." *Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1083 n.4 (1979). A "continuing employer" must continue to honor a preexisting collective bargaining agreement, notwithstanding the transfer of its stock. See *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 751 & n.20 (7th Cir. 1989); *EPE, Inc.* v. *NLRB*, 845 F.2d 483, 487 (4th Cir. 1988).

The determination whether a given case involves a successorship or a mere stock transfer is highly factbound. Cf. *Burns*, 406 U.S. at 274 ("Resolution [of a successorship issue] turns to a great extent on the precise facts involved here.") As the Board has explained, the relevant inquiry is whether the record demonstrates "more than the mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise." *Spencer Foods, Inc.*, 268 N.L.R.B. 1483, 1484-1485 n.5 (1984), affirmed in relevant part *sub nom. United Food & Commercial Workers, Local 152* v. *NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985). For where "a stock sale * * * serve[s] as a vehicle for acquisition of resources that will be used to operate a substantially different enterprise from that conducted by

the original owners, * * * the corporation might not be fairly termed a 'continuing' employer in any practical sense." *EPE*, 845 F.2d at 490.

Applying those principles, the Board reasonably found that, as of July 18, 1989, Tyson was a successor employer to Holly Farms. The Board observed that "Tyson's purchase of Holly Farms stock involved at the outset a broader form of reorganization than a mere stock transfer." Pet. App. A111. The Board explained that, "as early as January 1989, Tyson officials began formulating tentative plans for integrating the Holly Farms and Tyson transportation divisions." *Id.* at A111-A112. In addition, the Board found that, "at the time of the July 18 stock purchase, Tyson began to implement steps that would result in its substitution as the employing entity of the unit employees." *Id.* at A111. The Board found, in particular, that, "upon Tyson's assumption of control, key Holly Farms executives almost immediately were absorbed into the Tyson organization, and performed their duties as part of the Tyson management team and in accordance with Tyson's dictates." *Id.* at A112 (internal quotation marks omitted). The Board further found that Tyson's assumption of control affected negotiations with the Union over the labor agreement for the drivers-yardmen unit. *Id.* at A112-A113.[7] Those findings amply supported the Board's

[7] The Board found: "at the time of the stock purchase, negotiations between the Union[] and Holly Farms were suspended to enable * * * Holly Farms to clarify its status and bargaining position"; "to that end, on July 14 and 15, [1989,] management representatives from Holly Farms and Tyson met to discuss the status of the collective-bargaining negotiations, and also Tyson's corporate goals, which became the basis for the subsequent integration plans"; Holly Farms President Lovette "consulted with Tyson officials before instructing [petitioners'] attorney, Hogg, on how to present information about integration to the Union[]"; and, "when collective-bargaining negotiations resumed on August 8, [1989,] Tyson officials were present to answer questions about the operational changes that Tyson planned to implement." Pet. App. A112-A113 (internal quotation marks omitted). Indeed, as the ALJ noted, when negotiations resumed on August 8, 1989, petitioners' spokesman told the Union that Tyson "had taken full control over the Holly Farms operations" and was going to partially integrate Holly Farms' transportation operation into its own (*id.* at A602-A603); over the next several weeks, Tyson reconsidered that decision and decided instead to fully integrate Holly Farms' transportation operation. *Id.* at A617.

conclusion that "Tyson's involvement in the operation of the Holly Farms transportation division as of the time of its acquisition warrants the application of successorship principles as of that date." *Id.* at A113-A114.

b. Petitioners' challenge to the Board's finding of a successorship does not raise any issue warranting further review.

Petitioners contend (Pet. 39-40) that "a mere stock transfer, absent some accompanying substantial change in operations affecting the employees, does not make the new stockowner a successor to the existing employer's labor obligations." That contention, even if correct, is inapposite here.[8] The

[8] The decisions cited by petitioners (Pet. 33-40) in support of their contention do not conflict with the Board's finding of a successorship in this case. In *NLRB* v. *Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971), cited at Pet. 34, the court found on the facts presented that no successorship had occurred, because "[t]he transfer of the corporate stock from [the seller] to [the purchaser] did not change the corporate

Board did not base its conclusion of successorship on the existence of "a mere stock transfer." Rather, the Board relied on its determination that "Tyson's purchase of Holly Farms stock involved * * * a broader form of reorganization than a mere stock transfer." Pet. App. A111. Furthermore, the Board cited evidence that that was true both "at the outset" of Tyson's plan to acquire Holly Farms, *ibid.*, and in the wake of the acquisition, *id.* at A111-A113. See also pp. 5-6, 14, *supra* (summarizing evidence).

Petitioners nonetheless assert (Pet. 40) that, "for 2 months following the purchase, nothing changed for the former Holly Farms employees." That assertion

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entity." 445 F.2d at 930. In *Esmark, Inc.* v. *NLRB*, 887 F.2d 739 (7th Cir. 1989), cited at Pet. 38-39, the court held that, because "[t]he successorship doctrine is limited to situations in which the predecessor and successor are unrelated entities," 887 F.2d at 750, a company could not claim that it had become a "successor to itself" merely because of a public offering of a portion of the stock of its corporate parent. *Id.* at 749-750. While, in that context, the court stated that "[t]he successorship doctrine is simply inapplicable to a stock sale transaction" (*id.* at 751), the court affirmed that, as in this case, "[w]here the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than cajole, the possibility of its violating the federal labor laws is present." *Id.* at 757. The other cases cited by petitioners are also consistent with the Board's successorship finding in this case. See *United Food & Commercial Workers* v. *NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985) (agreeing with the Board that successorship principles were applicable because "the events at issue here plainly involved a broader form of business reorganization, and not a mere stock transfer"), cited at Pet. 36-38; *Miami Foundry Corp.* v. *NLRB*, 682 F.2d 587, 588-589 (6th Cir. 1982) (where stock purchaser became a "single employer" with acquired firm, stock purchaser was obligated to recognize the union and honor the labor agreement), cited at Pet. 35-36.

obscures the difference between operational changes perceptible to the employees and internal changes that, though not perceptible to the employees, were nonetheless of significance for their job situation. As the ALJ found, for two months after the acquisition, "there had been no significant occurrence *from the standpoint of unit employees.*" Pet. App. A716 (emphasis added). The court of appeals similarly observed that "the employees [c]ould understandably [have] view[ed] their job situation as essentially unaltered." *Id.* at A25-A26. As the court explained, the employees' perception of no essential change "establish[ed] [the] substantial continuity between Holly Farms and Tyson" upon which a finding of successorship may be premised. *Id.* at A25; cf. *Burns*, 406 U.S. at 280 n.4. But the fact that the employees would not have perceived any changes in their job situation did not mean that no significant changes actually occurred. On the contrary, both the ALJ and the Board found that such changes did occur, as Tyson asserted dominion over Holly Farms' executives and made plans to integrate Holly Farms' transportation system into that of Tyson. *Id.* at A111-A114, A717-A719. Those changes supported the Board's conclusion that, upon acquiring Holly Farms' stock, Tyson replaced Holly Farms as the employing entity.[9]

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[9] Because the Board correctly found that Tyson became a successor employer in July 1989, it properly determined that Tyson was not entitled unilaterally to change the terms and conditions of employment of Holly Farms' drivers in September 1989. See *NLRB* v. *Dent*, 534 F.2d 844, 846 n.2 (9th Cir. 1976); see also *Burns*, 406 U.S. at 294-295. Petitioners' challenge to the latter determination (Pet. 42-43) is based

2. Petitioners contend (Pet. 44-51) that the court of appeals erred in holding that Tyson was obligated to bargain with the Union over the terms and conditions of employment of Holly Farms' drivers upon their integration into Tyson's transportation system. Petitioners also contend that the court of appeals' holding conflicts with *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Those contentions are without merit.

In *First National Maintenance*, this Court considered the bargaining obligations of an employer that decided to close part of its business. 452 U.S. at 667. The Court held that, when such a decision has "as its focus only the economic profitability" of the business, it is a mandatory subject of bargaining "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden on the conduct of the business." *Id.* at 677, 679. At the same time, the Court reaffirmed the well-settled rule that the employer is obligated to bargain with the union regarding "the results or effects" on

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primarily on their erroneous contention that Tyson did not become a successor until that change occurred in September 1989—a contention contradicted by the Board's factual findings. Petitioners also contend (Pet. 43) that Tyson was free to withdraw recognition from the Union in September 1989 because "[t]he Holly employees were integrated into the much larger Tyson unit and lost any separate identity." See also Pet. ii (Question 2(b)). That contention, too, reflects merely a disagreement with the Board's specific finding that "the [Holly Farms] bargaining unit did not lose its separate identity" upon integration into Tyson's transportation system. Pet. App. A127. Such factbound disputes raise no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

employees of such non-bargainable decisions. *Id.* at 677 n.15; see also *id.* at 681 ("the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by [Section] 8(a)(5)").

Consistent with those principles, the Board reasonably concluded that, while Tyson's decision to integrate Holly Farms' transportation operation into its own was not a mandatory subject of bargaining (Pet. App. A120), petitioners were obligated to bargain about "the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers" (*id.* at A122). Matters such as pay, work locations, and schedules were proper subjects for "effects" bargaining with the Union, the Board explained, because they "were not an inevitable consequence of the functional integration of the transportation departments, but were only one of a number of responses to changed circumstances." *Ibid.* (internal quotation marks omitted); see also *id.* at A131 n.29. The court of appeals agreed, finding that, although Tyson's integration decision was "non-bargainable" (*id.* at A36), "there was room for bargaining over the drivers' working conditions, had Tyson been willing to bargain." *Id.* at A35. That case-specific finding does not warrant further review.[10]

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[10] Petitioners argue that effects bargaining cannot include "bargaining over the terms and conditions of employment that apply *after* an employee accepts a transfer elsewhere." Pet. 51. Petitioners do not cite any authority to support that argument. Such a restriction on the scope of effects bargaining would allow an employer unilaterally to alter employees' terms

3. Petitioners contend (Pet. 52) that the Board lacked authority to award reinstatement and backpay to the 47 Holly Farms drivers who were illegally discharged because they refused to accept Tyson's unilateral terms and conditions of employment. According to petitioners, the drivers had only two options: (1) to accept employment under the unlawfully imposed terms and conditions while pursuing unfair labor practice charges; or (2) to go on strike. Pet. 53-54. Contrary to petitioners' view, the drivers had a third option—to refuse to work under what they regarded as unlawful terms and conditions of employment, and to file unfair labor practice charges with the Board. Choosing that option did not require them to forgo a Board remedy for the unlawful activity. See *Tuskegee Area Transportation System*, 308 N.L.R.B. 251, 252-253 (1992), enforced mem., 5 F.3d 1499 (11th Cir. 1993), cert. denied, 114 S. Ct. 1834 (1994).

Nor was it "illogical" (Pet. 56) for the Board to order the 47 drivers to be reinstated immediately and paid backpay retroactive to the date of their discharge (Pet. App. A178-A180), while conditioning the reinstatement and backpay of the strikers upon their making an unconditional offer to return to work (*id.* at 184). The Board has reasonably determined that a dischargee's situation typically differs from that of an unfair labor practice striker.[11] A dischargee may be reluctant to apply for reinstatement, and such an

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and conditions of employment simply by changing their job location.

[11] See *S&F Enterprises, Inc.*, 312 N.L.R.B. 770, 770 & n.4 (1993); *Drug Package Co.*, N.L.R.B. 108, 113-114 (1977), modified on other grounds, 570 F.2d 1340 (8th Cir. 1978).

application may well be futile, since the employer has made clear (by the discharge) that the employee's services are not wanted. Unfair labor practice strikers, on the other hand, leave their jobs voluntarily. Moreover, an employer may need more time to reinstate unfair labor practice strikers because of the need to discharge replacement workers. Because the Board's views as to the appropriate remedy "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), the court of appeals correctly enforced the Board's order.[12]

4. Finally, petitioners and their amicus contend that petitioners' live haul workers are "agricultural laborer[s]" excluded from the Act's coverage under Section 2(3) of the Act. Pet. 57-63; National Broiler Council Amicus Br. (NBC Br.) 10-11. They also contend that the court of appeals' decision upholding the Board's contrary conclusion conflicts with decisions in other circuits. Pet. 60-61; NBC Br. 6-8. There is no merit to either contention.

a. Section 2(3) of the NLRA defines "employee" for purposes of the Act to exclude an "agricultural laborer." 29 U.S.C. 152(3). The meaning of "agricultural laborer" for purposes of Section 2(3) is governed by Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f). *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 300 n.6 (1977) ("Annually since

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[12] Contrary to petitioners' suggestion (Pet. 56), the Board's remedy for the 47 dischargees is not inconsistent with the principle of "work now, grieve later." The dischargees could not have filed grievances over petitioners' unilateral decision to change their terms and conditions of employment, since there was no labor contract in place at the time between petitioners and the Union.

1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of 'agricultural laborer' in § 2(3) of the NLRA to § 3(f) of the FLSA."). Section 3(f) of the FLSA, in turn, ties the definition of "agricultural laborer" to that of "[a]griculture," which it defines to mean "farming in all its branches" and to include

> the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

In *Bayside*, this Court stated that the term "agriculture" in the FLSA "includes farming in both a primary and secondary sense." 429 U.S. at 300. The Court explained that "[t]he raising of poultry is primary farming, but hauling products to or from a farm is not primary farming." *Id.* at 300-301. Such hauling may be "secondary farming," the Court observed, "if it is work performed 'by a farmer or on a farm as an incident to or in conjunction with such farming operations.'" *Id.* at 301 (quoting 29 U.S.C. 203(f)). Applying those principles, the Court upheld the Board's determination that truck drivers who hauled poultry feed from their employer's feed mill to the farms on which independent contract growers raised the employer's chickens were not engaged in "secondary farming" and hence were not "agricultural laborers." *Id.* at 301-304. The Court accepted the Board's view that the drivers' activities were not work performed "by a farmer," because "their employer's operation of the feedmill [was] a nonagricultural activity," and the farming activities of

the independent contract growers were not attributable to their employer, because its status as a farmer engaged in raising poultry ended when it contracted with the independent growers for the care and feeding of the chicks. *Id.* at 302-303.

Petitioners argue that, unlike the truck drivers in *Bayside*, the live haul employees in this case work "on a farm." Pet. 60-61; see also NBC Br. 11. The fact that an employee works on a farm, however, does not necessarily make the employee an "agricultural laborer." The employee's work must also be performed "as an incident to or in conjunction with [the] farming operations." 29 U.S.C. 203(f). That condition is not met here. The work of the live haul employees is not performed "incident to or in conjunction with" the farming operations of the independent growers. Those operations consist in the raising of chicks into full-grown chickens. That operation ends when the chicks have reached maturity, and it is only at that point that the work of the live haul employees begins. Thus, the activities of the live haul workers are incidental, not to the operations of the independent growers, but instead to petitioners' poultry slaughtering operation. The latter operation is not "farming" within the meaning of Section 3(f). See *Bayside*, 429 U.S. at 301.[13]

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[13] For the same reason, NBC errs in suggesting (Br. 10) that the live haul truck drivers, in particular, are "agricultural laborer[s]" because their work involves "delivery to storage or to market or to carriers for transportation to market" for purposes of Section 3(f) of the FLSA. Such delivery constitutes "agriculture" under Section 3(f) only if it is "incident to or in conjunction with" a "farming operation[]." The work of the live haul drivers is not "incident to" the farming operations of

That conclusion accords with Congress's purpose for including the phrase "on a farm" in Section 3(f) of the FLSA. As this Court has explained, Congress included that phrase to exempt from FLSA coverage the employees of specialized independent contractors, such as an employee who hauls his threshing machine "from farm to farm" and who "makes a business of doing nothing but threshing." *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 766-767 & n.16 (1949) (internal quotation marks omitted). Petitioners' live haul employees do not fall into that category, because petitioners do not make a business of providing chicken-catching and hauling services to farmers for hire.

b. Contrary to petitioners' contention (Pet. 58-60; see also NBC Br. 6-8), the decision below does not conflict with *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980), or *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972).

Sanderson Farms was an action by live haul employees to recover overtime wages under the FLSA. The Fifth Circuit held that the employees were "agricultural laborers." 629 F.2d at 1080-1081. The court acknowledged that this Court had upheld the Board's contrary conclusion with respect to the live haul employees before the Court in *Bayside*. *Id.* at 1080. In reaching a different result, the Fifth Circuit emphasized the "different procedural posture" of the two cases. *Id.* at 1081 n.4. The court explained that *Bayside* applied a "policy of judicial deference" to the Board that was "inapplicable" in the case before it.

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the independent growers; rather, it is "incident to" petitioners' poultry slaughtering operation.

Ibid. The Fifth Circuit thus recognized that, in an enforcement proceeding under the NLRA (such as *Bayside* and the present case), considerable deference would be due to the Board's determination of whether a group of employees were agricultural laborers, "regardless of how [the court] might have resolved the question as an initial matter." *Ibid.* (quoting *Bayside*, 429 U.S. at 304). Accordingly, *Sanderson Farms* does not conflict with the Fourth Circuit's decision in the present case to sustain the Board's determination that petitioners' live haul workers are not "agricultural laborers."

Nor does the decision below conflict with that of the Ninth Circuit in *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (1972). The Ninth Circuit's decision in *Ryckebosch* did not survive this Court's decision in *Bayside*. See *Bayside*, 429 U.S. at 299 & n.4 (noting "apparent conflict" between *Ryckebosch* and lower court decision affirmed in *Bayside*). In *Ryckebosch*, the court relied on *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969), to hold that drivers who transported the employer's chickens from the farms of independent contract growers to processing plants were "agricultural laborers." 471 F.2d at 21. *Strain Poultry*, in turn, had held that an employer is engaged in the "raising of poultry" even if its chickens are raised to maturity by independent growers. 405 F.2d at 1032-1033. That holding cannot be squared with *Bayside*'s approval of the Board's rule that, "when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks." 429 U.S. at 302 n.9 (quoting *Imco Poultry*,

202 N.L.R.B. 259, 260 (1973)). Accordingly, there is no reason to believe that the Ninth Circuit today would decide this case any differently than the court below did.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-5583

HOLLY FARMS FOOD, INC.[1], EMPLOYER

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, PETITIONER

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The Employer's name appears as amended at the hearing.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons: (See Attached)[2]

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[2] The Employer is engaged in the operation of an integrated poultry business with hatcheries located in North Carolina at Wilkesboro, North Wilkesboro, Hayes, Seaford, Suncrest, Catawba and Fairplanes. In addition, the Employer has a feed manufacturing plant in Roaring River, North Carolina, and a processing plant which produces broilers for sale to retail stores. The Petitioner, in its petition, seeks a unit comprised of all hatchery, live haul and feed haul employees, including the following classifications: driving, maintenance, blood testers, quality control, injector, primary breeders, breeders, feather sexing, and chicken catchers at the Wilkesboro, North Wilkesboro, Hays [*sic*], Roaring River, Sea[ford], Suncrest, and Fairplanes, North Carolina facilities; but excluding all office employees, guards and supervisors as defined in the Act. At the hearing, the Petitioner asserted that an appropriate unit would in addition to the above classification, include all feed mill employees and feed mill mechanics at the Roaring River facility, plus the employees at the Employer's Catawba, North Carolina hatchery.

The Employer takes the position that all petitioned-for employees are agricultural employees specifically excluded from the definition of "employee" in Section 2(3) of the Act. It further asserts, in the alternative, that the petitioned-for employees fall into four separate categories: (a) hatchery employees, (b) live haul employees; (c) feed haul employees; and (d) blood test employees, which share a community of interest only within their separate groups. The Petitioner and the Employer each filed briefs which have been carefully considered.

The record indicates that chickens used for breeding purposes, called pullets or breeder chickens, and chickens destined for retail stores, called broilers, are both grown from the same process. Hatchery employees process eggs, which have been picked up and transported from breeder farms under contract with the Employer. The eggs are first put into setters and are then transferred to incubators. When the chicks hatch, they are vaccinated, de-beaked, sexed, boxed and shipped to the breeder farms where they are grown. Once grown, the chickens are separated into the categories of pullets and broilers. Chicken catchers, as part of live haul crews (which include, one truck driver, and one fork lift operator), catch the broilers, box them and transport them to the processing plant. Pullet movers catch the pullets, vaccinate them, box and then transport them to laying houses. The breeder chickens then lay eggs which are gathered by the contract farmer and hauled by the Employer's employees to the hatchery to start the process again. Additionally, about 80 percent of the breeder chickens are purchased as baby chicks from farms and are then combined with the hatchery-produced chickens at the laying house. The record reflect[s] that there is significant interchange among employees who are based at the hatchery locations. For example, hatchery employees are sent to gather eggs and to do the work of blood test department employees. The hatchery live haul drivers regularly perform hatchery and maintenance work. Also, blood test employees help hauling eggs, and help the pullet crews to catch chickens.

The record indicates that live haul employees consist of two separate and distinct groups, broiler catchers and pullet catchers. The broiler catchers work out of the processing plant while the pullet catchers and egg haulers work in the hatchery operations. There is no interchange between these classifications. Broiler haulers do not haul pullets and pullet haulers do not haul broilers.

The Employer's feed mill operation at Roaring River, North Carolina consists of a feed mill, where grain is processed into feed, and a truck service center. At this location, feed mill employees process the feed and feed haul drivers transport it to the contract farms. Mechanics at this location service

the trucks used to haul the feed. The record reflects that there is no interchange between the feed mill employees and any of the employees working in the hatcheries or the processing plant.

Section 2(3) of the Act excludes agricultural laborers from the classification of employees covered under the Act. Since 1946, Congress has added riders to the Board's appropriation bill providing that no part of the appropriation shall be used in connection with bargaining units composed of agricultural laborers as set forth in Section 3(f) of the Fair Labor Standards Act. Section 3(f) defines agriculture as follows:

> Agriculture includes farming in all its branches and includes . . . the raising of poultry, and practices, . . . performed by a farmer [or] on a farm as an incident to, or in conjunction with such farming operations. . . .

The hatchery employees, on the basis of the record herein, are clearly engaged in the raising of poultry within the meaning of Section 3(f) of the Fair Labor Standards Act. See, e.g. *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967); *Lindstrom Hatchery and Poultry Farms*, 49 NLRB 776 (1943); *Bayside Enterprises, Inc. vs. N.L.R.B.*, 429 U.S. 298, 50 L. Ed. 2d. 494, 97 S. Ct[.] 576 (1977). As to the employees who engage in the pickup and delivery operations at the hatcheries (who also perform hatchery and maintenance duties), it is clear that their work in the hatchery is likewise agricultural in nature. Moreover, although hauling, generally, would appear to be a non-farm activity, the employees making pickups and deliveries in the circumstances presented here, particularly considering the process and functional integration in the hatchery, are similarly engaged in the exempt activity of raising poultry. Therefore, I conclude that the egg haulers and pullet haulers are also agricultural workers. *Arkansas Valley Industries, Inc.*, 167 NLRB 391 (1967).

As to the live haul employees, designated as chicken catchers, who work out of the processing plant, I conclude that their position is not included either in the primary or secondary definition of "agriculture" in Section 3(f) of the FLSA. In this connection, the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a

farmer engaged in the raising of poultry ends with respect to those chicks. *Impco* [*sic*] *Poultry, Division of International Multifoods Corporation*, 202 NLRB 259 (1973). Thus addressing the unit placement of the chicken catching crews, the record contains sufficient evidence of their functional integration, with other processing plant employees to warrant their inclusion with those employees, and would not otherwise warrant their inclusion in a separate unit.

Feed haul drivers do nothing but deliver grain to the contract farmers. These deliveries do not constitute work incident to the farmer's farm, but are, rather, work incident to the feed mill. By the same token, the feed mill employees and the mechanics are not involved in farming. Consequently, the feed mill employees, feed haul employees and the mechanics at the Employer's Roaring River, North Carolina factility [*sic*] are clearly non-agricultural employees. *Bayside Enterprise, Inc., vs. N.L.R.B.*, 429 U.S. 298, 50 L.Ed. 2nd. 494, 97 S. Ct. 576 (1977). The Petitioner, however, seeks a multi-location unit including all of the Roaring River employees along with the employees at the seven other locations of the Employer whom I have found to be agricultural employees. Further, the Petitioner, who for the first time at hearing included the feed mill employees in its petition, has not expressed a desire to represent only the Roaring River employees as a separate single location unit. Accordingly, as to the groups of individuals whom I have found to be agricultural employees, I find that no question affecting commerce exists within the meaning of 9(c)(1) of the Act, concerning the representation of "employees" as defined in Section 2(3) of the Act.

Moreover, as to those classification [*sic*] of employees whom I have concluded to be non-agricultural, and, therefore, subject to the coverage of the Act, I conclude that either the Petitioner has not sought their inclusion in an appropriate unit or as to the Roaring River employees has not expressed its desire to represent them as a single location unit. Therefore, I shall dismiss the petition in its entirety.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 10, 1989.

Dated March 27, 1989 /s/ Willie L. Clark, Jr.
Regional Director, Region [11]
at Winston-Salem, North Carolina